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No. 706

Supreme Court of the United States

[redacted], October Term, 1961

ALBERT BLOOM,

Petitioner,

v.

CHARLES LUNDBURG, Trooper,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner seeks a writ of certiorari to review a final judgment of the Supreme Court of Errors of Connecticut, entered November 21, 1961, which unanimously affirmed a judgment of the Superior Court for Fairfield County, Connecticut, dismissing a writ of *habeas corpus*, obtained by petitioner to defeat his extradition to New York.

Opinions Below

The opinions of the Courts below are adequately set forth in the petition. The opinion of the Supreme Court of Errors of Connecticut is also reported at 175 A. 2d 568.

Question Presented

May petitioner, a parole violator, defeat extradition in a *Habeas Corpus* proceeding, upon his conclusion that the supporting papers demonstrate no second felony information was filed in the demanding state where (1) the informa-

tion was in fact duly filed and is a matter of public record; (2) the supporting documents show that petitioner was properly sentenced as a second offender and contain all of the requirements for recognition by the governor of the asylum state.

Statement

On September 28, 1936, petitioner was indicted by a Westchester County (New York) Grand Jury, for Forgery in the Second Degree, a felony.

On March 23, 1937, the District Attorney of Westchester County filed an information, pursuant to the provisions of New York Penal Law, § 1943, accusing him of having been previously convicted of a felony*. Petitioner was duly arraigned upon the information; admitted that he was the same person mentioned therein and the fact of the previous conviction. He was thereupon sentenced, as a second felony offender, upon his plea of guilty, to an indeterminate term of from 10 to 20 years' imprisonment.

Petitioner was received in Sing Sing Prison on March 23, 1937, credited with 177 days prior jail time. He was paroled on July 27, 1943, declared delinquent as of June 19, 1945 and returned to prison as a parole violator† on June 18, 1946.

* He was convicted of forgery, in Suffolk County Superior Court, Massachusetts, on December 15, 1919.

† He was arrested, in the United States District Court, Boston, Massachusetts, in 1945, while on parole from New York, of stealing from the mails and forging and uttering a check. He was sentenced to a year and a day in the Federal Correctional Institution, Danbury, Connecticut. On June 17, 1946, he was released from that institution, waived extradition and was immediately returned to New York.

On December 6, 1954, he was again paroled from prison in New York State, to reside with a sister in Boston, Massachusetts, subject to the supervision of the Massachusetts Board of Parole.

On April 3, 1958, in the United States District Court, Boston, Massachusetts, while on parole from New York, petitioner pleaded guilty to a 19-count information, charging him with unlawful possession of the mail, in violation of 18 U. S. C. § 1708 and with forging and uttering United States Treasury checks, in violation of 18 U. S. C. § 495.*

On April 21, 1958, in that Court, he was sentenced to two years' imprisonment at the Federal Correctional Institution, Danbury, Connecticut.

He was declared delinquent by the New York State Board of Parole as of March 3, 1957 and a warrant dated April 7, 1958, was lodged as a detainer against him at the Federal Correctional Institution.

He was released from Federal custody on October 24, 1959, at which time he was taken into custody by the Connecticut State Police on the basis of the parole violation warrant lodged by the New York State Board of Parole.

On December 3, 1959, the Governor of New York requested the Governor of Connecticut to apprehend and deliver petitioner to the agents of the State of New York on the grounds that petitioner had violated his parole

* Seven counts of the information charged that between March 3, 1957 and June 14, 1957, he had in his possession 7 checks which had been contained in letters stolen from the mail, while twelve counts charged that between March 15, 1957 and June 14, 1957, he forged and uttered 6 U. S. Treasury checks, totaling $516.70. The larcenies were from U. S. Mail boxes and were of Social Security checks.

conditions by his conviction and sentence, in Federal Court, while on parole. On December 8, 1959, the Governor of Connecticut found that the New York demand was "conformable to the law and ought to be complied with" and issued a warrant for his extradition.

On December 24, 1959, respondent arrested petitioner pursuant to the warrant and brought him to the Danbury City Court, where, with counsel present, he was arraigned and released on bail.

By an application to the Superior Court, Fairfield County, petitioner sought a writ of *Habeas Corpus*, alleging that he was illegally restrained by the Connecticut Governor's warrant and writ of *Habeas Corpus* was issued on April 27, 1960. In an opinion filed July 6, 1960, that Court dismissed the petition and rendered judgment for respondent.

In a decision filed November 21, 1960, the Supreme Court of Errors of Connecticut unanimously affirmed. 175 A. 2d 568. Subsequently, Associate Justice Murphy of that Court entered an order granting a stay of judgment until final disposition of the matter by this Court.

ARGUMENT

The petitioner contends that New York's demanding papers show conclusively that no information was filed by the District Attorney of Westchester County, in 1937, charging him with being a second felony offender and therefore, his proper sentence should have been 10 years' imprisonment, as a first offender, rather than 10 to 20 years' imprisonment, as a second felony offender. He concludes that since he had served approximately 14 years in prison at the time of his parole in 1954, he had served 4

years in excess of his legal sentence; that there remained no unexpired portion of a sentence in New York at the time of his parole and therefore, that he cannot now be extradited to New York as a parole violator.

We will show, in reply: (1) that a second felony offender information was in fact filed by the District Attorney of Westchester County in 1937; (2) that this was and is a matter of public record, acknowledged in writing by the petitioner in a prior proceeding and officially reported in a decision of the New York Supreme Court; (3) that an indeterminate sentence of 10 to 20 years is absolutely proper, under New York Penal Law, § 888 and § 1941 for one sentenced as a second felony offender for forgery in the second degree; (4) that there still remains an unexpired portion of petitioner's 10 to 20 year sentence; (5) that there is no requirement in New York, statutory or otherwise, that the judgment of conviction refer to the filing of a multiple felony offender information and that the judgment of the Westchester County Court meets all the New York statutory requirements; (6) that even if no information had been filed by the District Attorney of Westchester County, the conviction is valid and the sole relief to which petitioner would be entitled would be a re-sentence *nunc pro tunc* in the demanding state, and (7) that the documents submitted by the Governor of New York contained all of the requirements for recognition by the Governor of Connecticut.

I

A second felony offender Information was filed.

On March 23, 1937, an Information was filed in the District Attorney of Westchester County, accusing petitioner of having previously been convicted of a felony, in

Massachusetts, in 1919 (Resp. Appendix 1). On March 23, 1937, in the Westchester County Court, petitioner was duly arraigned upon this information, prior to being sentenced as a second felony offender (Resp. Appendix 2). He thereupon admitted that he was the same person named in the information and the prior convictions against him.

In 1949, petitioner brought a *coram nobis* proceeding in Westchester County Court, wherein he applied for resentencing as a first offender. In an affidavit in support of his motion therein, petitioner stated, in pertinent part:

> ALBERT BLOOM, being duly sworn, deposes and says:
>
> * * * On the said 23rd day of March, 1937, I was charged in an information filed pursuant to Section 1944 of the Penal Law, as being a second offender. I pled guilty to this information and admitted that I was the same person mentioned in the records and admitted the said previous conviction. * * *
>
> ALBERT BLOOM"

Although petitioner was represented by other counsel in that proceeding, we call to the Court's attention the fact that the sole other affidavit submitted in his behalf therein, was sworn to by one Max Kabatznick, an attorney of Boston, Massachusetts, who appears to be the same person who is of counsel for petitioner in this proceeding.

The motion in that proceeding was denied by an order dated December 6, 1940. On appeal, the New York Supreme Court, Appellate Division, Second Judicial Department unanimously affirmed. *People* v. *Bloom*, 276 App. Div. 1101 (1950). In its decision that Court noted:

> * * * On March 23, 1937, defendant pleaded guilty to the crime of forgery in the second degree. An information was then filed against him charging him with being a second offender in that he had been convicted in Massachusetts in 1919 of the crime of forgery in the second degree. Sentence was thereafter

> imposed upon the defendant, as a second offender, to a term of ten to twenty years. * * *"

Thus it appears, as a matter of public record, that an information was in fact filed by the District Attorney of Westchester County in 1937; that petitioner was duly arraigned in open Court upon that information and admitted the fact of his first conviction. It also appears, again as a matter of public record, that petitioner admitted the foregoing facts in a sworn statement in writing and that the New York Supreme Court, Appellate Division, has held that an information was filed in 1937.

II

The indeterminate sentence of 10 to 20 years imposed upon petitioner in New York, was absolutely proper.

We submit that the Westchester County Court properly sentenced petitioner, in 1937, to an indeterminate term of 10 to 20 years, as a second offender, upon conviction of forgery in the second degree. At the time of petitioner's conviction, the punishment for forgery in the second degree, for a first felony offender, was imprisonment for a term not exceeding 10 years. New York Penal Law, § 888. With certain exceptions not here applicable, the punishment for a second felony offender is "imprisonment for an indeterminate term, the minimum of which shall be not less than one-half of the longest term prescribed upon a first conviction, and the maximum of which shall be not longer than twice such longest term * * *." New York Penal Law, § 1941. It has been specifically held that the proper punishment of one convicted of forgery in the second degree, who is a second felony offender, is an indeterminate term of 10 to 20 years' imprisonment. *People ex rel. LaMere v. Jackson*, 9 A. D. 2d 843 (Third Dept., 1959).

Even if the District Attorney of Westchester County had never accused petitioner, by indictment or information, of being a second felony offender, his *conviction* is proper and the sole relief to which he would be entitled would be a resentence, *nunc pro tunc* as of 1937 in compliance with Penal Law, § 1943. *People ex rel. Hallenbeck* v. *Morhous*, 265 App. Div. 979 (Third Dept., 1942). Obviously, this relief can be obtained only in the demanding state and not in the state of asylum.

III

There still remains an unserved portion of petitioner's 10 to 20 year sentence.

Because of his conviction in Federal Court, petitioner has been charged by the New York State Board of Parole with having violated the terms and conditions of his parole. At the time petitioner was released from prison on parole, New York Correction Law, § 219, provided if any prisoner, while on parole, is convicted of a crime under the laws of another state, government or country, which if committed in New York would be a felony, * * * he shall upon being returned to this state be compelled to serve in State Prison the portion remaining of the maximum term of the sentence on which he was released on parole from the time of such release on parole until the expiration of such maximum." Under these provisions, petitioner owes the State of New York 4 years, 8 months and 12 days, computed thus:

	Year	*Month*	*Day*
Maximum expiration date	1959	08	15
Date of parole	1954	12	03
Time left to serve	04	08	12

Even if petitioner should subsequently be held as a parole delinquent (*id.*, § 218) rather than as a parole felony violator (*id.*, § 219) he has not completed his maximum sentence in New York.

New York Penal Law, § 218, at the time of his release on parole, provided that the Board of Parole "may, if it sees fit, require such prisoner to serve out in prison the balance of the maximum term for which he was originally sentenced calculated from the date of delinquency . . . ." Under this more liberal provision, petitioner would have remaining, unserved, 2 years, 5 months and 12 days of his sentence, calculated as follows:

	Year	*Month*	*Day*
Maximum expiration date	1959	08	15
Declared delinquent	1957	03	03
Time left to serve:	02	05	12

In either situation it will be observed that a portion of petitioner's 1937 sentence remains unserved. Although his sentence was for an indeterminate term, it is the rule in New York the minimum term of such a sentence merely accelerates the period in which a prisoner becomes eligible for parole consideration, while the maximum term represents the actual sentence that must be served. *People ex rel. Clemente v. Murphy*, 9 N. Y. 2d 215 (1960). Under calculations most favorable to petitioner, he still has an unserved portion of his New York sentence of approximately 2½ years.

IV

There is no need for a judgment of conviction, in New York, to refer to the filing of a multiple felony offender information and the judgment herein meets every statutory requirement of New York State.

It will be observed that in the body of the judgment of conviction herein (Petitioner's Appendix F) a number of blank spaces were provided for the insertion of information relating to the filing of and arraignment upon a multiple felony offender information. These blanks were not filled in, and from this petitioner concludes, at p. 13 of his brief, that "the formal judgment demonstrates that no information was filed charging petitioner as a second offender." We submit that no such conclusion is warranted.

While New York practice permits a District Attorney to proceed against a multiple felony offender either by indictment or information, *People* v. *DeSantis*, 305 N. Y. 44 (1953), cert. den. 345 U. S. 944 (1953), there is no requirement whatsoever that a judgment of conviction refer to the filing of a multiple felony information, nor has petitioner cited any such requirement. The material contained in the 1937 judgment in this respect, therefore, was mere surplusage, and the failure to complete the blank spaces in no way vitiates that judgment, nor does it affect the validity of the sentence imposed.

Under New York practice the judgment of conviction must specify the place of imprisonment (Penal Law; § 2180); where the sentence is to imprisonment for more than one year, it must specify that it shall be "at hard labor" (*id.*, § 2183); it may suspend sentence or the execution thereof (*id.*, § 2188); for most first offenders it must impose an indeterminate sentence (*id.*, § 2189) and must

impose the indeterminate term of imprisonment mandated for multiple felony offenders (*id.*, §§ 1941-4). The only other requirement is that a second felony offender must be sentenced as such, notwithstanding the fact that the sentences of second and third felony offenders are governed by the same formula. *People* v. *French*, 5 A. D. 2d 852, (Second Dept., 1958).

New York Code of Criminal Procedure, § 484, which specifies what papers shall constitute the judgment-roll, does not include a multiple offender information. The rationale for this, as the Supreme Court of Errors of Connecticut noted in its opinion, is that New York's second offender statute does not create a new crime. "The facts which are necessary to enable the court to determine whether an accused is a second offender are not necessarily or ordinarily any part of the crime which has been charged. They are collateral matters and, whatever measure of punishment is adopted as a result of these collateral facts, the offense as a criminal offense remains unchanged. * * *."

Since the 1937 judgment of conviction meets all of New York's statutory requirements including the sentence of petitioner specifically as a second felony offender, we submit that it is valid on its face and petitioner's conclusion that it shows no information was filed, is totally incorrect.

V

The documents submitted by the Governor of New York contain all of the requirements for recognition by the Governor of Connecticut.

Connecticut General Statutes § 54-159, enumerate all of the requirements of a demand for extradition, for recogni-

tion by the Governor of Connecticut.* The Supreme Court of Errors of Connecticut held that "the documents submitted by the Governor of New York contain all of these requirements." The documents submitted by the Governor of New York included: (1) the indictment; (2) the judgment of conviction; (3) the sentence imposed by the Court; (4) the commitment to state prison; (5) the parole agreement and (6) the determination of parole delinquency, showing that petitioner is a parole violator. Petitioner has conceded that a convict who violates parole can be extradited to serve the unexpired portion of the sentence imposed in the demanding state. We submit that his contentions with respect to filing of a multiple offender information in New York have been shown to be false as a matter of public record and that his efforts to avoid extradition on the grounds presented should fail. *Appelwards* v. *Massachusetts*, 203 U. S. 222 (1906), *Moulthrope* v. *Matús*, 139 C. 272.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

Otto J. Saur
State's Attorney for Fairfield County
Attorney for Respondent
County Court House
Bridgeport, Connecticut

Joseph J. Rose
Assistant Attorney General
State of New York
of Counsel

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*This section is identical with the provisions of Section 3 of the Uniform Criminal Extradition Act.

Respondent's Appendix 1

COUNTY COURT—WESTCHESTER COUNTY

THE PEOPLE OF THE STATE OF NEW YORK,

against

ALBERT BLOOM, alias ABRAHAM BLOOM, alias H. RICHARDSON, alias H. BERMAN.

BE IT REMEMBERED by this Information that I, Walter A. Ferris, District Attorney of the County of Westchester, do accuse the defendant above named heretofore on the 14th day of January, 1937, and herein duly convicted before Honorable Gerald Nolan, County Judge of Westchester County, of the crime and felony of Forgery in the second degree, committed after the first day of July, 1926, of having been previously to the said conviction likewise convicted of a certain crime and felony, that is to say:

That the said defendant under the name of Abraham Bloom, otherwise called H. Richardson, otherwise called H. Berman, on the 10th day of June, 1919, in the Superior Court, within and for the County of Suffolk, in the commonwealth of Massachusetts, was duly by law convicted of the crime and felony of Forgery, upon his plea of guilty, and thereafter on the 15th day of December, 1919, was sentenced by said Court to be placed on probation and to recognize in three hundred dollars with a probation officer

of said court, a surety for his further appearance before said court.

Dated: White Plains, N. Y., this 23rd day of March, 1937.

WALTER A. FERRIS
District Attorney of the
County of Westchester

(SEAL)

NO FEE

State of New York, }
County of Westchester. } ss.:

I, EDWARD L. WARREN, Clerk of the County of Westchester, and also Clerk of the County and Supreme Courts in and for said County, the same being Courts of record,

Do HEREBY CERTIFY That I have compared the preceding Information with the original in the action of The People of the State of New York vs. Albert Bloom, alias Abraham Bloom alias H. Richardson-Berman filed in this office on the 23rd day of March 1937, and do hereby certify the same to be a correct transcript therefrom and of the whole of such original.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Courts and County, this 9th day of February 1962.

EDWARD L. WARREN,
Clerk

(SEAL)

Respondent's Appendix 2

At a Term of the County Court, held in and for the County of Westchester, at the County Court House in the City of White Plains, N. Y., on the 23rd day of March, 1937.

Court met pursuant to recess.

Present: Hon. Gerald Nolan, County Judge.

Proclamation made and Court opened.

THE PEOPLE, *vs.* ALBERT BLOOM.	Information charging previous felony conviction filed pursuant to Section 1943 Penal Law W. F. Horan, A. D. A. Edward H. Innes

The District Attorney filed the following Information pursuant to Section 1943 of the Penal Law, accusing the defendant above named with previous felony conviction as follows:

THE PEOPLE, *vs.* ALBERT BLOOM under the name of ABRAHAM BLOOM.	June 4th, 1919, Boston, Mass. Forgery. Probation 2 Years

The defendant above named having been charged with previous felony conviction by an Information filed pursuant to Section 1942 Penal Law; now on being arraigned to plead to same and being informed of the allegations contained therein and of his right to be tried by a jury as to the truth thereof according to law; he pleads Guilty and admits

he is the same person mentioned in the records as set forth in said Information and admits said previous felony conviction.

THE PEOPLE, *vs.* ALBERT BLOOM.	Forgery 2nd degree W. F. Horan, A. D. A. Edward H. Innett

The defendant above named having heretofore pleaded Guilty to the crime of Forgery 2nd degree and having been duly sworn and having answered all questions; now on being arraigned for sentence and being asked if he had any legal cause to show why judgment should not be pronounced against him and he answering "NO",

WHEREUPON, IT IS ORDERED AND ADJUDGED BY THE COURT, that the said Albert Bloom, for the offense aforesaid, whereof he is convicted, he having been heretofore convicted of a felony, be imprisioned in the Sing Sing State Prison at Ossining, N. Y., at hard labor, under an indeterminate sentence, the maximum of such imprisonment to be Twenty Years No Months, and the Minimum Ten Years No Months; and it is

ORDERED, that the Sheriff of the County of Westchester forthwith convey the said Albert Bloom to the Sing Sing State Prison at Ossining, N. Y., in conformity with the terms of this sentence.

A TRUE COPY OF THE MINUTES.

EDWARD L. WARREN,
Clerk.

(SEAL)

Respondent's Appendix 2

NOTICE

State of New York, }
County of Westchester, } ss.

I, EDWARD L. WARREN, Clerk of the County of Westchester, and also Clerk of the County and Supreme Courts in and for said County, the same being Courts of record,

DO HEREBY CERTIFY That I have compared the preceding Minutes with the original in the action of The People vs. Albert Bloom entered in this office on the 23rd day of March 1937, and do hereby certify the same to be a correct transcript therefrom and of the whole of such original.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Courts and County, this 16th day of February 1962.

(SEAL)

EDWARD L. WARREN,
Clerk

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